No. 13,025

United States Court of Appeals
For the Ninth Circuit

E. R. CRAIN and FINTON J. PHELAN, JR., on Behalf of Themselves and Other Persons Similarly Situated,
Appellants,

vs.

THE GOVERNMENT OF GUAM,
Appellee.

Appeal from the District Court of Guam, Territory of Guam.

APPELLEE'S BRIEF.

RUSSELL L. STEVENS,
For KNIGHT G. AULSBROOK,
Attorney General of Guam,
Agana, Guam,
Attorney for Defendant-Appellee.

Subject Index

Table of Authorities Cited

Statutes

Rules

Texts

Miscellaneous

No. 13,025

United States Court of Appeals
For the Ninth Circuit

E. R. CRAIN and FINTON J. PHELAN, JR., on Behalf of Themselves and Other Persons Similarly Situated,
Appellants,

vs.

THE GOVERNMENT OF GUAM,
Appellee.

Appeal from the District Court of Guam, Territory of Guam.

APPELLEE'S BRIEF.

Appellee does not controvert appellants' statement of the case. Appellee's argument in answer to alleged errors I, II and III is as follows:

ARGUMENT.

ARGUMENT IN REPLY TO POINT I IN APPELLANTS' BRIEF.

Point I of Appellants' brief is as follows:

"The Court Did Not Exercise Sound Discretion in Refusing Plaintiff's Oral Motion for an Extension of Time to Properly Prepare and Present Points and Authorities in Opposition to Defendant's Motion to Dismiss."

The answer to said point is:

Rule 6(b) of the Federal Rules of Civil Procedure provides as follows:

> (b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them.

This rule provides for discretionary enlargement of time in two instances: (a) if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, and (b) upon motion made after the expiration of the specified period where the failure to act was the result of excusable neglect.

Rule 7(b) (1) of the Federal Rules of Civil Procedure provides as follows:

> (b) *Motions and Other Papers.*
>
> (1) An application to the court for an order shall be by motion which, unless made during a

> hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

This rule requires a written motion if the motion is made before hearing. As indicated in Specification of Error I of Appellants' brief, Appellants' Motion for Enlargement of Time was made orally, and at the time of hearing of Appellee's Motion to Dismiss. Therefore, it was valid if at all, only if made in compliance with that portion of Rule 6(b) (2) which provides for discretionary enlargement of time upon motion made after the expiration of the specified period where the failure to act was the result of excusable neglect. There is no showing in Appellants' brief of "excusable neglect" which would permit the enlargement of time sought by Appellants.

In their Specification of Error I, Appellants argue on the basis of denial of additional time allegedly required to present authorities and argue points of law. This argument should have been presented by written motion filed before the date set for hearing Appellee's Motion to Dismiss, pursuant to the terms of Rule 7(b) (1).

Rule 6(d) of the Federal Rules of Civil Procedure provides a 5-day period for noticing motions, "unless a different period is fixed by these rules or by order of the court." Rule 6(b) permits enlargement by the

Court "in its discretion." Rule 6(b) is a grant of power, not a limitation. It neither states nor implies that the Court must exercise "reasonable" discretion. Appellants have cited no case indicating a requirement of reasonableness in exercise by the Court of its discretionary power.

Even admitting, without conceding, that the Court's exercise of its discretionary power is subject to review on appeal, Appellants have shown no prejudice of their case arising from the Court's action. They argued and were heard on the motion date noticed, as indicated in their brief. The Motion to Dismiss was decided on the basis of points of law involved, as indicated in the Court's decision. In the absence of a showing of prejudice, the Court's action is not subject to a reversal.

Consideration of a complaint presupposes presentation of a case supported by law. Appellants' complaint was drafted at their leisure and filed at a time of their own choosing. It is presumed that applicable legal aspects were briefed prior to preparation of the complaint. A motion to dismiss goes to the very heart of a stated case, and it is submitted that Appellants should have anticipated such a motion and should have been prepared to argue the validity of the complaint almost immediately upon service of the Motion to Dismiss. It is submitted further that the notice period of five days, codified as reasonable following the legal experience and history of our Federal Court system, is ample for preparation

of support of the complaint filed by Appellants. The complaint is a simple one, free from the complex, intricate features which sometimes require an enlargement of time for the purpose of preparing legal arguments.

The District Court stated its reasons for denying Appellants' oral Motion for Enlargement of Time. The stated reasons were not designated for the record. In the absence of such designation and argument thereon, Appellants cannot ascribe as abusive, the Court's discretionary action.

ARGUMENT IN REPLY TO POINT II IN APPELLANTS' BRIEF.

Point II of Appellants' brief is as follows:

> "The Court Erred in Holding that the Government of Guam was Immune to Suit."

The answer to said point is:

The theory of governmental immunity to suit without consent is so well established in the Anglo-American system of law that it seems beyond legal attack. Appropriate and leading cases on the subject are discussed hereinbelow. Appellants seek to avoid the application to their case of this well established rule of law. They state at page 42 of their brief:

> "We have under consideration a problem which has never been subjected to judicial scrutiny and evaluation."

It is submitted that there is nothing in this case which gives rise to a problem unique in the field of law, and that established rules of law are applicable.

The theory of Appellants is that the only governmental bodies which are immune from suit without consent are those which are independent of control in any form, i.e., true sovereigns. Appellants conclude that because Guam is not a sovereign in its strictest sense, it is not immune to suit.

Appellants devote approximately 35 pages of their total of 49 pages to consideration of the question of whether Guam is a sovereignty in its strictest sense. Throughout their discussion is the repeated definition of "Sovereignty", with quotations from authorities to the effect that sovereignty means the supreme and uncontrollable power by which persons are governed. There is no true sovereign in the United States. If the definition contended for by Appellants were to control the legal principles of this appeal, it is submitted there would be no governing body in the United States governmental system which is immune to suit without consent. The Constitution of the United States purposefully was drafted as a limitation and control of the actions of the governments of the United States and its component states. Appellants' argument is opposed to their definition of a sovereignty. They state at page 27 of their brief:

> "However only sovereignties are free to enact such laws as they see fit without supervision and without restriction."

A cursory reading of the Constitution of the United States indicates numerous examples of limitation and restriction of the government of the United States, which is referred to throughout Appellants' Specification of Error II, as a true sovereign which is immune to suit.

Therefore, lengthy definitions and discussions of the term "Sovereign" are not in point. They do not resolve the issue, nor assist its resolution.

Appellants accept the theory of natural immunity to suit of states, and of Alaska, Hawaii and Puerto Rico. They deny such immunity of Guam. Since all these bodies are governing entities by virtue of constitutions and organic acts, Appellants apparently believe that governmental immunity to suit depends upon a system of governmental hierarchy. They seem to contend that as one ascends from some point in the hierarchy, immunity to suit applies, and that any government below such point has no immunity to suit. Appellants' argument is an attempt to place Guam below such point.

Appellants argue that the degree of control of governmental action establishes the point at which the immunity theory becomes effective.

The Organic Act of Alaska provides in part as follows:

> "*Laws submitted to Congress.* All laws passed by the Legislature of the Territory of Alaska shall be submitted to Congress by the President of the United States, and, if disapproved by

Congress, they shall be null and of no effect. (Act of August 24, 1912, c. 387, sec. 20, 37 Stat. 518.)"

The Organic Act of Hawaii sets forth a large number of specific restrictions on the legislative power of the legislature of Hawaii.

Act of Apr. 30, 1900, c. 339, sec. 55, 31 Stat. 150; May 27, 1910, c. 258, sec. 4, 36 Stat. 444; July 9, 1921, c. 42, sec. 302, 42 Stat. 116; Nov. 23, 1921, c. 134, sec. 3, 42 Stat. 223.

The Organic Act of Puerto Rico provides in part as follows:

"*Law to be reported to Congress.* All laws enacted by the Legislature of Porto Rico shall be reported to the Congress of the United States, as provided in section 842 of this title, which reserves the power and authority to annul the same. If at the termination of any fiscal year the appropriations necessary for the support of the government for the ensuing fiscal year shall not have been made, the several sums appropriated in the last appropriation bills for the objects and purposes therein specified, so far as the same may be applicable, shall be deemed to be reappropriated item by item; and until the legislature shall act in such behalf the treasurer may, with the advice of the governor, make the payments necessary for the purpose aforesaid." (Mar. 2, 1917, c. 145, sec. 34, 39 Stat. 961.)

The Organic Act of Guam provides in part as follows:

> "All laws enacted by the legislature shall be reported by the Governor to the head of the department or agency designated by the President under section 3 of this Act, and by him to the Congress of the United States, which reserves the power and authority to annul the same. If any such law is not annulled by the Congress of the United States within one year of the date of its receipt by that body, it shall be deemed to have been approved." (Act of Aug. 1, 1950, c. 512, sec. 19, 64 Stat. 389.)

From these quotations, it is seen that control by the government of the United States of the legislatures of Alaska, Hawaii, Puerto Rico and Guam essentially is the same. No intent of Congress to set up any degree of control as argued by Appellants can be made out.

Appellants state at page 13 of their brief:

> "The terms of the 'Organic Law for Guam' are inconsistent with the definitions of sovereignty contained in the cited authorities. A sovereignty is not subordinate and under the supervision of an agency, department or of a government official."

Application of such conclusion to Guam without its equal application to Alaska, Hawaii and Puerto Rico is inconsistent with Appellants' admission of immunity to suit of such other territories.

At pages 9 and 10 of their brief, Appellants quote from various sections of the Organic Act of Guam in an attempt to show control by the Government of

the United States over the government of Guam, in addition to the legislative control discussed above. Appellants conclude at page 21 of their brief:

> "Clearly Congress did not by the 'Organic Act' create a sovereignty. Congress negatived such construction by the express restrictions which were spelled out in the 'Organic Act'. Guam having a legislative government, being a possession, must be subordinate to Congress."

All Territories are subject to limitations and restrictions, in addition to those applicable to legislatures discussed hereinabove. For a general summary of restrictions on all territories, see Chapter 10 of 48 U.S.C.A. A perusal of this chapter, and a study of the provisions of the organic acts of all Territories, indicate the extent of Congressional control over such Territories.

The foregoing Territorial limitations, general and legislative, demonstrate the inconsistency of Appellants' contention of Congressional differentiation of Territorial status for the purpose of establishing immunity to suit on the basis of degree of "Sovereignty" or degree of control.

At pages 9 and 13 of their brief, Appellants argue that Congressional intent to establish Territorial degrees of "Sovereignty" is indicated by the names given to territories by the Congress of the United States. This conclusion is not valid. The Organic Act of Puerto Rico provides that the name of the political entity shall be "People of Porto Rico." It is

neither "Territory" nor "territory". Certainly "Sovereignty" does not derive from such a name.

At page 13 of their brief Appellants argue that the use in the Organic Act of Guam of capital letters in the words "territory" and "government" sets forth that

> "there is clearly the recognition of a difference and a distinction between Guam and other Territories of the United States."

This argument is not supported by law. Although the Territories of Alaska and Hawaii are designated with a capital T, Congressional legislation establishing the governments of the Virgin Islands and Porto Rico refer to them throughout, as "Government". Act of June 22, 1936, c. 699, sec. 1, et seq., 49 Stat. 1807. Apr. 12, 1900, c. 191, sec. 1, 31 Stat. 77; May 2, 1917. c. 145, sec. 1, 39 Stat. 951, et seq. Further, as explained above, Puerto Rico is not even designated as a territory but as "People of Porto Rico."

Appellants also attempt to differentiate Guam from other territories on the basis that Guam is not politically incorporated into the United States. At page 13 of their brief, they state:

> "When Congress defined Guam as an unincorporated territory of the United States is clearly intended to distinguesh Guam from Territories and to set such entity apart from them."

Appellants admit immunity of Puerto Rico to suit without consent. However, Puerto Rico is not incorporated into the United States of America.

> "On the whole, therefore, we find no features in the Organic Act of Porto Rico of 1917 from which we can infer the purpose of Congress to incorporate Porto Rico into the United States with the consequences which would follow." *Balzac v. People of Porto Rico,* 42 S. Ct. 343, 348 (1922).

It is therefore apparent that there is no degree of "Sovereignty" which takes Guam from the concept of immunity applicable to Puerto Rico on the theory of incorporation of the entity into the United States.

At page 14 of their brief, Appellants quote from the case of *First National Bank of Brunswick, Maine v. County of Yankton,* 101 U.S. 129, 133. This case was decided in 1880, and held that Congress may legislate for the territory of Dakota, as a state may for its municipal organizations. The case was not concerned at any point with the question of immunity of a territory to suit.

At page 15 of their brief, Appellants quote from the case of *Talbott v. Board of County Commissioners of Silver Bow County,* 139 U.S. 438. This case, decided in 1891, involved the power of Montana territory to tax national banking associations. It was held that territories can tax such associations. The case did not involve immunity of a territory to suit.

At page 16 of their brief, Appellants quote from the case of *Murphy v. Ramsey,* 114 U.S. 15. This case, decided in 1885, concerned Congressional power over the right of suffrage in the territory of Utah. The

question of territorial immunity from suit was not involved.

Also at page 16 of their brief, Appellants quote from the case of *Snow v. United States,* 18 Wall. 317. This case, decided in 1873, involved the powers of the Attorney General of the territory of Utah and was not concerned with the question of territorial immunity from suit. It should be noted incidentally, that these early cases usually refer to the entities as "territories" rather than "Territories".

At page 17 of their brief, Appellants quote from the case of *Christianson v. King County,* 239 U.S. 356, 362. This case was decided in 1901, and was concerned with the legislative power of the territory of Washington relative to the matter of escheat. No question of territorial immunity from suit was involved.

At pages 17 and 18 of their brief, Appellants quote from the case of *Thurlow v. The Commonwealth of Massachusetts,* 5 How. 587. This case was decided in 1847, and concerned the matter of licensing of dealers in spirituous liquors. No problem of territorial immunity from suit was involved.

At page 18 of their brief, Appellants refer to section 25(b) of the Organic Act of Guam to establish the proposition that Congress "clearly intended Guam to be a Possession in contemplation of law." This section provides in part as follows:

> "Except as otherwise provided in this Act, no law of the United States hereafter enacted shall

> have any force or effect within Guam unless specifically made applicable by Act of Congress either by reference to Guam by name or by reference to 'possessions'."

A possession politically speaking is synonymous with a dependency, the meaning of the terms differing only in the manner of acquisition of title. Black's Law Dictionary, Third Edition, page 557.

The terms "territory" and "dependency" are used synonymously. Puerto Rico is referred to as both. *People of Puerto Rico v. Shell Co.,* 302 U.S. 253, 82 L. ed. 235, 58 S. Ct. 167.

Appellants' argument that Section 25(b) aforesaid confers upon Guam the status of something less than a territory, in derogation of other, and specific provisions of the Organic Act of Guam has no support in law.

Further, Appellants do not show the law to be that possessions are not immune from suit without consent. Regardless of any label which might be attached to a political entity, its immunity to suit depends upon the attributes possessed by the entity. As more fully appears hereinbelow, the basic consideration in determination of governmental immunity to suit is whether a decision allowing suit would inure to the detriment of the governmental authority over its subjects, when such authority is requisite for the public good.

Still further, if Appellants were desirous of placing a label on the government of Guam, they selected the

wrong provision of the Organic Act. The Organic Act of Guam established the government of Guam as a territory in the following words:

> "Guam is declared to be an unincorporated territory of the United States . . ." (Act of Aug. 1, 1950, c. 512, sec. 3, 64 Stat. 384.)

At page 19 of their brief, Appellants refer to Guam as "merely a piece or parcel of real estate transferred from the Crown of Spain to the United States", and also state that "The Island of Guam was not transferred to the United States as a political entity or state in being, but as a colony, or at most, an embryonic political community." As explained hereinabove, the brief of Appellants admits immunity from suit on the part of the territory of Alaska, which is the political equivalent of Hawaii. However, at the time Alaska was ceded to the United States by Russia in 1867, there was no Alaskan government. The governing authority of Alaska remained unorganized until 1884, subject to the provisions of the act of Congress of July 27, 1868, c. 273, 15 Stat. 240 and subsequent acts. The legislative assembly of the Territory of Alaska was not established by an act of the United States Congress until August 24, 1912. Therefore, the existence of a government at the time of acquisition of territorial status is unimportant. Appellants argue that because Hawaii was a republic at the time it became a territory, and the Philippine Islands had an established government at the time they were ceded to the United States, im-

munity to suit followed naturally as an attribute of such government. Appellants' argument thus is seen to be based on isolated cases rather than on principle. Further, the question herein rests solely on the status of the government of Guam at the time of the suit and whatever its status may have been in the past is immaterial.

At page 19 of their brief, Appellants argue that when transferred to the ownership of the United States, Guam became a piece or parcel of real estate owned by the United States. Such a statement is true in Guam only to the extent that it is true in every territory and possession of the United States. The executive power of each territory is vested in a Governor, who holds his office for four years and until his successor is appointed and qualified, unless sooner removed by the President. R.S. 1841. The Secretary of each territory also is appointed by the President of the United States. R.S. 1843. Restrictions on qualifications of voters of all territories are prescribed by the Congress of the United States. R.S. Section 1860; March 3, 1883, c. 134, 22 Stat. 567. For a compilation of general provisions affecting all the territories of the United States, see 48 U.S.C.A. Chapter 10. Section 28 of the Organic Act of Guam establishes property rights in all publicly owned land of Guam. However, private rights remain as they have been since prior to acquisition of Guam by the United States, and the United States has no greater right to such property than it does to privately owned property in any territory or state within the United States.

The statement of Appellants is inconsistent with the theory of our government and factually is incorrect. Territories and possessions of the United States are governed by grant of power and authority extended by the Federal government. The United States does not "own" as a piece of real estate, such Territories and possessions.

At page 32 of their brief, Appellants state:

> "True, every governmental agency possesses, but not of its own essence, certain of the attributes of sovereignty. Such is possessed by virtue of the needs, desires, authority and for the benefit of its superior."

The question for decision on this appeal is not the academic and unimportant one of whether Guam is a "sovereignty" in the strictest sense of the word. The only question with which we are concerned is whether Guam possesses, in the words of Appellants, certain of the attributes of sovereignty.

The conclusion of the question of "Sovereignty" and immunity reached by Appellants at page 43 of their brief is not supported by law, or by Appellants' brief. Appellants say:

> ". . . it can only be concluded that Congress did not intend to create a sovereignty such as it created in the more mature dependencies of the United States, namely, Alaska, Hawaii, Puerto Rico and formerly, the Philippine Islands."

A reading of the cases expounding the law of the matter of territorial immunity to suit without con-

sent discloses that the cases and authorities relied upon by Appellants are not in point, and that their theory is outside the law of the subject. The law is as follows:

The case of *Kawananakoa et al. v. Polyblank et al.,* 205 U.S. 349, 27 S. Ct. 526, is one of the leading cases on this subject, and summarily disposes of Appellants' theory that immunity to suit depends upon possession of "sovereignty" in its strictest sense. The following is quoted from this case, which was decided by the Supreme Court of the Territory of Hawaii and decided on appeal to the Supreme Court of the United States on April 8, 1907. In holding that the Territory of Hawaii is immune to suit without its consent, the Court stated:

> "Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since the days of Hobbes. Leviathan, chap. 26, 2. A sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. 'Car on peut bien recevoir loy d'autruy, mais il est impossible par nature de se donner loy.' Bodin, Republique, 1, chap. 8, ed. 1629, p. 132; Sir John Eliot, De Jure Maiestatis, chap. 3. Nemo suo statuto ligatur necessitative. Baldus, De Leg. et Const. Digna Vox, 2. ed. 1496, fol. 51b, ed. 1539, fol. 61.
>
> As the ground is thus logical and practical, the doctrine is not confined to powers that are sov-

ereign in the full sense of juridical theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the territory itself is the fountain from which rights ordinarily flow. It is true that Congress might intervene, just as, in the case of a state, the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by Congress or the Constitution, except to the extent of certain limitations of power. The District of Columbia is different, because there the body of private rights is created and controlled by Congress, and not by a legislature of the District. But for the territory of Hawaii it is enough to refer to the organic act. Act of April 30, 1900, chap. 339, sec. 6, 55, 31 Stat. at L. 141, 142, 150. Coffield v. Territory, 13 Haw. 478. See, further, Territory v. Doty, 1 Pinney (Wis.) 396, 405; Langford v. King, 1 Mont. 33; Fisk v. Cuthbert, 2 Mont. 593, 598."

In the case of *People of Porto Rico v. Manuel Rosaly Y. Castillo,* 227 U. S. 270, 33 S. Ct. 352 (1913), the Supreme Court of the United States held that the government of Puerto Rico possesses a natural immunity to suit even though it is a government not incorporated into the United States.

The Court stated at page 273:

"It is not open to controversy that, aside from the existence of some exception, the government which the organic act established in Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent. In the first place, this is true because, in a general sense, so far as concerns the framework of the Porto Rican government and the legislative, judicial and executive authority with which it is endowed, there is, if not a complete identity, at least, in all essential matters, a strong likeness to the powers usually given to organized territories, and, moreover, a striking similarity to the organic act of the Hawaiian Islands (act of April 30, 1900, chap. 339, sec. 6, 55, 31 Stat. at L. 141, 142 and 150). But, as the incorporated territories have always been held to possess an immunity from suit, and as it has been, moreover, settled that the government created for Hawaii is of such a character as to give it immunity from suit without its consent, it follows that this is also the case as to Porto Rico. Kawananakoa v. Polyblank, 205 U.S. 349, 353, 51 L. ed. 834, 836, 27 Sup. Ct. Rep. 526. This, moreover, is additionally beyond question because, in considering the nature and character of the government of Porto Rico in New York ex rel. Kopel v. Bingham, 211 U.S. 468, 53 L. ed. 286, 29 Sup. Ct. Rep. 190, it was said (p. 476): 'It may be justly asserted that Porto Rico is a completely organized territory, although not a territory incorporated into the United States, and that there

is no reason why Porto Rico should not be held to be such a territory.' Besides, in Gromer v. Standard Dredging Co., 224 U.S. 362, 56 L. ed. 801, 32 Sup. Ct. Rep. 499, in considering the subject and giving due weight to 'the precaution against abuse' of the Porto Rican legislative power, and after calling attention to the reservation made by Congress of the right to repeal any Porto Rican act of legislation, it was nevertheless declared (p. 370): 'The purpose of the act is to give local self-government conferring an autonomy similar to that of the states.' "

The Court concluded at page 277:

"In view, however, of the terms of the organic act, of the prior decisions recognizing that the purpose of Congress in adopting it was to follow the plan applied from the beginning to the organized territories by creating a government conforming to the American system, with defined and divided powers,—legislative, executive, and judicial,—in further view of the fact that the exercise of the judicial power here claimed would be destructive of that system, we are of opinion that it cannot be supposed that Congress intended by the clause in question to destroy the government which it was its purpose to create."

Puerto Rico has never been incorporated into the United States. *Balzac v. People of Porto Rico,* (Supra). Its immunity to suit without its consent has been established by the law in a number of cases in addition to the above-quoted case. *Veitia et al. v. Fortuna Estates,* 240 F. 256; *Richardson v. Vajardo*

Sugar Company, 36 S. Ct. 476, 241 U.S. 44, 60 L. ed. 879 (1916); *Richmond v. People of Porto Rico,* 99 N.Y.S. 743, 51 Misc. Rep. 220 (1906); *People of Puerto Rico v. Shell Co.,* 58 S. Ct. 167, 302 U.S. 253 (1937).

One striking difference between the Organic Act of Guam and that of Puerto Rico stands in sharp opposition to the attempted reasoning of Appellants. Section 7 of the Organic Act of Puerto Rico invests the

> "* * * People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such."

The foregoing cases held the provision of the Organic Act relative to suit did not impair the natural immunity of Puerto Rico to suit without its consent.

Section 3 of the Organic Act of Guam provides in part that:

> "The government of Guam shall have the powers set forth in this act and shall have the power to sue by such name."

This provision is a clear recognition of provision for Guam's immunity to suit without its consent.

Appellants closed their argument on this point with the statement at pages 43-44:

> "Rather, Congress created a subordinate instrumentality for a specific purpose, that instrumentality being like in nature to other Congressionally created agencies and instrumentalities of the Government of the United States, and like such

other agencies and instrumentalities, the Government of Guam is not immune to suit and is subject to the jurisdiction of the courts of the United States."

Such conclusion disregards the law. It is elemental that a subordinate agency created by the United States Government is immune to suit without consent of the United States. 54 Am. Jur., United States, sec. 138; 23 Am. Jur., Foreign Corporations, sec. 572; cases and annotation cited therein. This immunity applies to the District of Columbia. 49 Am. Jur., States, Territories, and Dependencies, sec. 144. Certainly it would apply to Guam, if Guam occupied the status attributed to it by Appellants, "a piece or parcel of real estate owned by the United States."

Appellants cited no authority, and gave no law or reason, to establish their contention that Guam occupies a status in the United States different from Puerto Rico.

By the terms of its Organic Act, Guam is an unincorporated territory of the United States. Puerto Rico is an unincorporated territory of the United States. The law is firmly established that Puerto Rico is immune to suit without its consent. Therefore, by law and authority the government of Guam is immune to suit without its consent.

ARGUMENT IN REPLY TO POINT III IN APPELLANTS' BRIEF.

Point III of Appellants' brief is as follows:

> "The Court Erred in Holding that it Could Not Assume Jurisdiction of the Subject Matter of the Suit."

The answer to said point is:

Section 30 of the Organic Act of Guam provides in part as follows:

> "All customs duties and Federal income taxes derived from Guam, * * * shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for the benefit and government of Guam in accordance with the annual budgets."

Section 31 of the Organic Act of Guam provides as follows:

> "The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam."

The effect of the foregoing sections clearly is to create a tax liability on Guam, with collections to accrue to the government of Guam.

This conclusion is supported by the Legislative history of the Organic Act of Guam. In discussing Section 31, Congressman Miller of Nebraska stated from the floor of the House of Representatives:

> "There will be no direct payment by the Treasury of this country. The amendment we have just adopted in committee provides that the in-

come-tax laws in force in the United States of America and which may hereafter be in force will be in the law over there. That will be of great help in plugging certain loopholes. The people of Guam and a large number of civilians and workers over there on construction work, as well as military personnel, pay no income tax or have no withholding tax. In fact, they are paid a bonus for working there. This will plug that loophole and bring in some money to the United States Treasury. (Cong. Rec., May 23, 1950, Vol. 96, pp. 7673 and 7674.)"

Regardless of who collects the tax created by the Organic Act of Guam, it is imposed by the Federal Government, and is levied and collected in accordance with the income tax laws of the United States.

Appellants admit that by reason of the Organic Act of Guam, the United States income tax laws apply to Guam. Page 45 of Appellants' brief.

Upon attempt by the government of Guam to collect the Federally-imposed income tax, Appellants filed their complaint as plaintiffs, and sought a declaratory judgment holding in part:

(1) That the Internal Revenue Code of the United States applies to Guam as written.

(2) That the unincorporated territory of Guam is, with respect to the United States, a possession.

(3) That the government created by the Organic Act of Guam is a government of limited and express powers.

(4) That the Income Tax Laws of the United States are not repealed or suspended by the provisions of the Organic Act of Guam.

(5) That the Organic Act of Guam does not create a territorial income tax.

Appellants asserted in their complaint that the government of Guam had no authority under the provisions of Section 31 of the Organic Act to impose or collect the tax there established.

Clearly, a Federal tax is involved. Equally as clearly, there is a controversy between the parties hereto, as to the proper agency for collection of the tax. The provisions of the Federal Declaratory Judgments Act preclude the remedy sought by Appellants. The Act provides as follows:

> "*Creation of Remedy.* In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139, sec. 111, 63 Stat. 105."

In their complaint as plaintiffs, Appellants affirmatively asked the District Court of Guam for a decision that the tax was a Federal one, to be imposed and collected by the Federal government. The Declaratory

Judgments Act, *supra,* is a direct bar to assumption of jurisdiction by the District Court. *Noland v. Westover, et al.,* 172 F. (2d) 615; *Red Star Yeast and Products Company v. LaBiddle,* 83 F. (2d) 394; *Wilson v. Wilson,* 141 F. (2d) 599.

Appellants now seek to avoid the effect they created by their own case, on the basis that Appellees contend the tax is not a Federal one. Appellants have attempted by the application of labels, to avoid the application of a law. At page 45 of their brief, they state:

> "* * * since what is questioned is whether or not there is a territorial tax, the controversy is about such territorial tax."

If such reasoning were sound, Appellees could as well contend:

> "Since what is questioned is whether or not there is a Federal tax, the controversy is in respect to such Federal tax, and the Declaratory Judgments act applies as written."

In order to validate the contention of Appellants, the case first would have to be decided, then the rule applied as sought by Appellants. They seek to omit the first step, and proceed immediately to the conclusion of the case. Only by such reasoning could the law be avoided.

Appellants quote at length from the case of *Filipowicz v. Rothensies, Collector of Internal Revenue,* 31 F. Supp. 716, 721, and state at page 46 of their brief, that the case is "in point on all fours."

It is submitted that the quoted case is not in point. The Court stated at page 722 of the reported decision:

> "Aside from analogy to cases under R.S., section 3224, logically it is arguable that all that is sought is a declaration of the rights of the various interested parties to the fund in question. The tax collector claims by virtue of an alleged prior assignment. There will be no decision as to the propriety of the tax. There is no controversy over a federal tax. There is, however, a controversy as to the alleged rights of various claimants to specific property. In light of this analysis, it would seem evident that a declaratory judgment as to the property rights of the parties involved would be permissible."

In the case herein, there is not a controversy as to alleged rights of claimants to specific property, as in the *Filipowicz* case, *supra*. In their complaint as plaintiffs, Appellants did not deny the existence of a tax, and in their prayer, they asked for judgment "that the Internal Revenue Code of the United States applies to Guam as written." Appellants have shown no interest in the fund representing the amount of their tax. Their only stated interest is in who collects the tax.

The *Filipowicz* case, supra, is authority for the position of Appellees. The Court said as follows, at page 722:

> "It would seem that Section 274d of the Judicial Code should be interpreted to deny a declaratory judgment to a petitioner only where the latter

could not obtain an injunction under R.S. 3224 against illegal seizure by a tax collector."

R.S. 3224, referred to by the Court, was repealed by act of Congress of February 10, 1939, c. 2, sec. 4. R.S. 3224 in effect was incorporated in a subsequent act (53 Stat. 446) in the following language:

> "*Prohibition of suits to restrain assessment or collection*
>
> (a) *Tax.* Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.
>
> (b) *Liability of transferee or fiduciary.* No suit shall be maintained in any court for the purpose of restraining the assessment or collection of (1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect to any income, war-profits, excess-profits, or estate tax, (2) the amount of the liability, at law or in equity, of a transferee of property of a donor in respect to any gift tax, or (3) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (U.S.C., Title 31, sec. 192) in respect of any such tax. 53 Stat. 446."

Since appellants could not restrain collection of the tax in question, neither could they obtain a declaratory judgment with respect thereto.

CONCLUSION.

Appellee concludes that the District Court of Guam committed no reversible error and that the decision appealed from should be affirmed in its entirety.

Dated, Agana, Guam,
December 10, 1951.

Respectfully submitted,
RUSSELL L. STEVENS,
For KNIGHT G. AULSBROOK,
Attorney General of Guam,
Attorney for Defendant-Appellee.